BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT BINGHAM	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,819
K-MART CORPORATION	)	
Respondent,	)	
Self-Insured	)	

ORDER

Claimant appealed the March 22, 2001 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument in Topeka, Kansas, on September 25, 2001.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for claimant. Clifford K. Stubbs of Roeland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a left knee injury, which allegedly occurred at work during a series of repetitive mini-traumas through March 29, 2000. At the regular hearing, the parties stipulated that the appropriate accident date for the alleged series of mini-traumas should be March 29, 2000.

In the March 22, 2001 Award, Judge Avery denied claimant's request for benefits after finding that claimant failed to provide respondent with timely notice of the accidental injury.

Claimant contends Judge Avery erred. Claimant argues that he provided respondent with timely notice of the accidental injury as he advised respondent on March

30, 2000, that he was seeking medical treatment for his knee but that he did not know what was wrong with it or what had caused it. Claimant contends that was sufficient notice of the accidental injury for purposes of the Workers Compensation Act. In the alternative, claimant argues that he had just cause for initially failing to advise respondent that his knee problems were related to work as he was not aware of that fact until sometime in May 2000 when he received a copy of a document from his doctor that related the knee problems to work. Therefore, claimant contends the time period to provide notice was extended to 75 days and, accordingly, the conversation claimant had with respondent's occupational health nurse on approximately May 19, 2000, in which claimant connected the knee problems to work activities, constituted timely notice.

Claimant requests the Board to reverse the Award and grant him medical benefits; temporary total disability benefits for the period from March 30, 2000, through July 10, 2000; and permanent disability benefits for a 10 percent functional impairment to the left lower extremity.

Conversely, respondent contends the Award should be affirmed. Respondent argues claimant initially advised respondent his knee problems were from hitting his knee on a cabinet at home and that claimant has failed to prove that the left knee injury is related to work. Further, respondent argues claimant did not provide timely notice of the accidental injury and that just cause did not exist to extend the time period for providing notice. Finally, respondent argues claimant failed to prove the amount of functional impairment he sustained as a result of the left knee injury as a doctor did not establish the functional impairment rating according to the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*).

In summary, the issues before the Board on this appeal are:

1. Was claimant's left knee injury caused from the work he performed for respondent?

2. If so, did claimant provide respondent with timely notice of the accidental injury?

3. If so, did claimant prove the nature and extent of his injury? And, if so, what is claimant's functional impairment?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. In September 1999, claimant began working for respondent, a large retail store chain. In either late February or early March 2000, claimant began experiencing symptoms in his left knee, which worsened as he continued to perform his job as a maintenance worker in respondent's distribution center. The symptoms, which began as minor

intermittent pain, progressed to constant pain. By late March 2000, the left knee was popping, snapping, locking, and giving way.

2. Claimant worked as a maintenance worker on respondent's third shift, which commenced at 11 p.m. Claimant had no knee problems before working for respondent. Claimant's job duties consisted of repairing and maintaining respondent's conveyor system, which required him to extensively squat and kneel.

3. Claimant sought medical treatment for his left knee and on March 27, 2000, saw Dr. Timothy W. Borchers. At that visit, claimant told the doctor that he had experienced left knee pain for over a month. Dr. Borchers did not take claimant off work but referred him to Dr. Joseph E. Mumford for an April 7, 2000 orthopedic evaluation.

4. Claimant telephoned respondent on March 27, 2000, before seeing Dr. Borchers, and left a message on respondent's answering machine that he would be absent from work that day because his knee was bothering him terribly and that he was going to see a doctor later that morning. Claimant did not work March 27, 2000, but he did work both March 28 and March 29. Although claimant intended to continue working as best he could, on March 30, 2000, respondent determined claimant did not have a work-related injury and, therefore, it would not permit claimant to continue working as it would not accommodate him.

According to the documents introduced by respondent at the preliminary hearing, on March 30, 2000, Dr. Borchers faxed a document that indicated claimant was having left knee pain and swelling and that the condition had begun approximately February 2000 and had lasted from one to four weeks. That document also indicated that it would be necessary for claimant to work intermittently or less than full-time. Considering the entire record, the Board finds it is more probable than not that the faxed document went to respondent's occupational health nurse, Joyce Illingworth.

5. The parties dispute whether or not claimant advised respondent that he bumped his knee on a cabinet at home. Claimant denies that statement. But respondent's Joyce Illingworth testified that claimant attributed his complaints to such incident. On March 30, 2000, claimant advised Ms. Illingworth that neither he nor his doctor knew what was wrong with claimant's left knee and that Dr. Borchers had referred him to Dr. Mumford. Claimant also told the nurse that he did not know if his knee problems were caused by work and that he did not know what he had done to it.

The Board finds that claimant's rendition of the facts concerning his conversations with Ms. Illingworth are more accurate than Ms. Illingworth's version. The histories that claimant gave Dr. Borchers on March 27, 2000, and later to Dr. Mumford, are consistent with claimant's contention that he did not attribute his knee problems to an incident at home. Further, the Board finds respondent's nurse had difficulty in remembering the facts surrounding certain conversations and claimant's leaving work on March 30, 2000. Finally,

it makes no sense that claimant would provide Dr. Borchers a history of having progressively worsening symptoms with no particular initiating event and shortly thereafter advise respondent's nurse that he had hit his knee on a cabinet at home. In short, the Board finds claimant's testimony credible and persuasive.

6. In April 2000, claimant began treating with Dr. Mumford. On May 5, 2000, the doctor operated on claimant's left knee and removed part of the meniscus. Claimant testified, as follows:

> Q. (Mr. Ostrowski) What was your understanding of the surgical procedure that Dr. Mumford performed?
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> A. (Claimant) He removed part of, a torn part of my cartilage in my left knee and some meniscus, he called it. He removed some mica, meniscus I believe he called it.[1]

Claimant's testimony that Dr. Mumford performed a partial meniscectomy is uncontradicted.

7. In May 2000, sometime after the left knee surgery, claimant received a copy of a disability claim form that Dr. Mumford had prepared. That form, which was dated May 9, 2000, indicated that claimant had sustained a work-related injury. After receiving the copy of the disability claim form and after reviewing a copy of a brochure regarding knee injuries that he had obtained from Dr. Mumford's office, claimant concluded that his knee injury may have been caused from the repetitive squatting he did at work. On either May 18 or May 19, 2000, claimant telephoned respondent's nurse and told her that the knee injury may have been caused by his work activities.

8. At regular hearing, claimant introduced Table 64 from the AMA *Guides*, which provides the lower extremity functional impairment rating due to a meniscectomy to the knee. That table provides a two percent lower extremity impairment for a partial medial or lateral meniscectomy, a seven percent impairment for a total medial or lateral meniscectomy, a 10 percent lower extremity rating for a partial medial and lateral meniscectomy, and a 22 percent rating for a total medial and lateral meniscectomy.

9. The record does not establish that both the medial and lateral meniscus were partially removed, which Table 64 of the AMA *Guides* rates at 10 percent to the lower extremity. But claimant has established that he has at least a partial medial or lateral meniscectomy, which Table 64 of the AMA *Guides* rates at two percent to the lower extremity.

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[1] Regular Hearing, February 12, 2001; pp. 10, 11.

10. Claimant was off work because of his left knee beginning March 30, 2000. Dr. Mumford released claimant to regular duties as of June 22, 2000, as long as claimant restricted his kneeling to no more than once per day. Dr. Mumford did not testify to otherwise address claimant's ability to work following surgery.

CONCLUSIONS OF LAW

1. The Award should be reversed to award claimant medical benefits, temporary total disability benefits, and permanent partial disability benefits for a two percent functional impairment to the left lower extremity.

2. The Board concludes that claimant injured his left knee in a series of mini-traumas sustained while working for respondent through March 29, 2000. The Board also concludes that the left knee injury arose out of and in the course of claimant's employment with respondent.

3. The Workers Compensation Act requires workers to give notice of their accidental injury within 10 days of when it occurred. But that 10-day period may be extended to 75 days if the worker can prove that the failure to notify the employer within the initial 10-day period was due to just cause. Further, the employer's actual knowledge of the accident renders the giving of such notice unnecessary.[2]

Because claimant was not aware until May 2000 that his left knee injury was caused by his work activities, there was just cause which extended the time for providing notice of the accidental injury from 10 days to 75 days from the last day of mini-traumas sustained. Accordingly, when claimant advised respondent on approximately May 19, 2000, that his left knee injury could be attributed to his work activities, that notice was timely.

4. Based on the uncontradicted testimony that he underwent a partial meniscectomy, claimant has established that he has a two percent permanent functional impairment to the left lower extremity according to the AMA *Guides*. Therefore, claimant should receive permanent disability benefits under the "scheduled injury" statute, K.S.A. 1999 Supp. 44-510d, which provides:

. . .

(16) For the loss of a leg, 200 weeks.

. . .

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[2] See K.S.A. 44-520 (Furse 1993).

> (21) . . . For the permanent partial loss of the use of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, compensation shall be paid as provided for in K.S.A. 44-510c and amendments thereto, per week during that proportion of the number of weeks in the foregoing schedule provided for the loss of such finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, which partial loss thereof bears to the total loss of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear; but in no event shall the compensation payable hereunder for such partial loss exceed the compensation payable under the schedule for the total loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, exclusive of the healing period. . . .
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> . . .
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> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

As opposed to K.S.A. 1999 Supp. 44-510e,[3] which specifically states that functional impairment is to be established by competent medical evidence and based on the AMA *Guides*, K.S.A. 1999 Supp. 44-510d(a)(23) is worded differently and omits the language that competent medical evidence is required in proving a worker's functional impairment. Accordingly, the Board disagrees with respondent's argument that only a doctor can establish functional impairment for an injury contained in the scheduled injury statute.

Once claimant established the nature of the surgical procedure and that the surgical procedure was rated in a table of the AMA *Guides* that had been introduced into evidence, a prima facie case was made for that percentage of impairment the *Guides* provide for that procedure. The burden then shifted to respondent to go forward with the evidence regarding the functional impairment rating, which it did not do. While expert medical testimony is generally required to support a medical opinion or something that requires special education, training and/or experience, such as making a diagnosis, that is not the situation here. When the AMA *Guides* rate a scheduled injury based merely on the surgical procedure performed and require no expert analysis and when the table that rates such surgical procedure has been introduced into the record, there is no valid reason to require expert medical testimony to establish the functional impairment rating.

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[3] K.S.A. 1999 Supp. 44-510e(a) provides, in part: ". . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. . . ."

> The basis for the admission of expert testimony is necessity, arising out of the particular circumstances of the case. Where the normal experience and qualifications of jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are not necessary. . . .[4]

Looking at a table in the AMA *Guides* that gives an impairment rating based on a specific surgical procedure or diagnosis is no different than the trier of fact looking at the *Guides* to judge the relative credibility of multiple impairment ratings provided by various medical experts.

Of course, the finding that claimant has proven his functional impairment rating under the AMA *Guides* without expert medical testimony for this scheduled injury is limited to this claim. Workers compensation practitioners are forewarned that expert medical testimony will likely be required to establish the functional impairment rating for scheduled injuries in most instances. Generally, if determining the functional impairment rating requires a medical analysis or a diagnosis from an expert, expert medical evidence will be required.

5. The Board concludes claimant is entitled to temporary total disability benefits from March 30, 2000, through June 21, 2000.

6. Claimant is entitled to the reasonable and necessary medical expenses incurred for the left knee treatment, unauthorized medical benefits up to the statutory maximum of $500, and future medical benefits upon proper application to and approval of the Director of the Division of Workers Compensation.

AWARD

WHEREFORE, the Board reverses the March 22, 2001 Award and grants claimant medical benefits, temporary total disability benefits, and permanent partial disability benefits for a two percent functional impairment to the left lower extremity.

Robert Bingham is granted compensation from K-Mart Corporation for a March 29, 2000 accident and resulting disability. Mr. Bingham is entitled to receive 12 weeks of temporary total disability benefits at $383 per week, or $4,596, plus 3.76 weeks of permanent partial disability benefits at $383 per week, or $1,440.08, for a two percent permanent partial disability, making a total award of $6,036.08, which is all due and owing less any amounts previously paid.

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[4] *Falls v. Scott*, 249 Kan. 54, 63, 815 P.2d 1104 (1991).

Claimant is also entitled to payment of the reasonable and necessary medical expenses incurred for treatment of the left knee, unauthorized medical benefits not to exceed $500, and future medical benefits after approval by the Director of the Division of Workers Compensation.

The Board adopts the order assessing the administrative costs as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of December 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in the above matter. Claimant alleges an injury to his left knee from a series of repetitive traumas through March 29, 2000. It is acknowledged that claimant's work with respondent required a substantial amount of squatting, which claimant ultimately testified placed strain on his left knee. However, the evidence leading up to claimant's allegation of the work-related injury does not support claimant's contention that he suffered accidental injury arising out of and in the course of his employment or that he provided timely notice of an accident.

When claimant first sought treatment for his knee with Timothy W. Borchers, M.D., on March 27, 2000, he described the pain in his left knee as having existed for over one month. There was no mention of a work-related connection to claimant's ongoing problems. During follow-up examinations with Joseph E. Mumford, M.D., of the Kansas Orthopedics & Sports Medicine group, claimant provided conflicting information about whether this injury was related to his employment.

A disability claim form signed by claimant and dated March 29, 2000, indicated that claimant had left knee pain and that he had struck his knee at home. A Disability Claim Telephone Reporting Guide form completed by respondent's employee indicated that claimant had struck his knee at home. When respondent's nurse, Joyce Ann Illingworth,

discussed the problem with claimant on or about March 28, 2000, she inquired as to whether the injury was work-related. Claimant advised her that he had struck his knee on a cabinet at home. This conversation also verified an earlier voice mail left by claimant to respondent that he had struck his knee on a cabinet at home.

After informing respondent that he had suffered a knee injury, claimant requested and received short-term disability. Additionally, claimant received medical treatment which was provided by respondent's group medical insurance rather than through its workers compensation insurance program.

The first documented notice to respondent that claimant suffered a work-related knee injury was on May 19, 2000, when he contacted respondent requesting that an accident report be prepared. That accident report prepared by Ms. Illingworth was the first allegation that the injury to claimant's left knee was work-related.

Claimant testified he didn't link his knee injury to work until he visited the doctor's office. However, claimant also testified that his work required repetitive kneeling activities on a regular basis. As the Administrative Law Judge noted, it is inconceivable that claimant would not be able to connect those symptoms with his work activities had the accident truly been the result of the physical activities at work.

In workers compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

Additionally, the Board, on many occasions, has given credence to the administrative law judge's opportunity to view the witnesses during live testimony. This administrative law judge observed claimant testify on two occasions, finding claimant on both occasions less than credible with regard to timely notice.

This Board Member would find the evidence more persuasive that claimant has not proven that he suffered accidental injury arising out of and in the course of his employment with respondent on the date alleged but instead suffered a non-work-related injury when he struck his knee on a cabinet at home. Additionally, I would find that claimant did not advise respondent until May 19, 2000, that he was claiming a work-related accident, thus violating the 10-day and just cause provisions of K.S.A. 44-520 (Furse 1993).

Therefore, this Board Member would affirm the Administrative Law Judge's decision to deny benefits in this instance.

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the majority's opinion in this matter. I agree with the majority's opinion that claimant satisfied his burden of proving his claim compensable and his entitlement to an award of temporary total disability, payment of past medical expenses as authorized, unauthorized medical, and future medical benefits upon approval of the Director. But I would find claimant failed to satisfy his burden of proving a permanent impairment of function as a result of his work-related left leg injury as required by K.S.A. 1999 Supp. 44-510d(a). Accordingly, I would deny claimant a permanent partial disability award based on the "scheduled injury" statute for a leg injury found at K.S.A. 1999 Supp. 44-510d(a)(16).

In a workers compensation case, the claimant is charged with the responsibility to establish his right to an award of compensation and prove the various conditions on which his right depends.[5] The workers compensation act defines burden of proof as "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

As noted in the majority's opinion, claimant suffered a left knee injury while working for the respondent. On May 5, 2000, orthopedic surgeon Dr. Joseph E. Mumford performed surgery on claimant's left knee. Dr. Mumford did not testify in this case and the only medical records of Dr. Mumford admitted into the record were exhibits admitted at the June 7, 2000, preliminary hearing. The parties stipulated that those medical record exhibits would be part of the record for the final award. Those exhibits consisted of (1) a Disability Claim for MetLife completed and signed by Dr. Mumford on May 9, 2000, that indicated, (a) claimant had injured his left knee at work, (b) the primary diagnosis was sprained knee/patella and the secondary diagnosis was anterior derangement of left knee, (c) recommended left knee arthroscopy and, (d) claimant could return to work on May 8, 2000, to desk work only; (2) a Kansas Orthopedic and Sports Medicine Provisional Consultation Report dated May 15, 2000, signed by Dr. Mumford's nurse for Dr. Mumford that returned claimant to temporary alternative work with restrictions on May 15, 2000; and (3) a Kansas Orthopedic and Sports Medicine Provisional Consultation Report dated June 21, 2000, signed by Dr. Mumford's nurse for Dr. Mumford that returned claimant to regular duty on June 22, 2000, with restrictions of occasionally kneeling not more than once per day. The record does not include Dr. Mumford's operative report or any of his medical examination treatment notes before or after the May 5, 2000, operation.

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[5] *See* K.S.A. 1999 Supp. 44-501(a).

[6] *See* K.S.A. 1999 Supp. 44-508(g).

Claimant, however, through his attorney's questioning, testified as to his understanding of Dr. Mumford's surgical procedure and his resulting permanent impairment of function as follows:

> Q. (Mr. Ostrowski) What was your understanding of the surgical procedure that Dr. Mumford performed?
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> A. (Claimant) He removed part of, a torn part of my cartilage in my left knee and some meniscus, he called it. He removed some mica, [sic], meniscus I believe he called it.[7]
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> . . .
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> Q. (Ostrowski) And who or what directed you to a meniscus cartilage tear?
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> A. (Claimant) In my opinion?
>
> Q. (Ostrowski) No. Why did you focus on meniscus cartilage tear?
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> A. (Claimant) Dr. Mumford diagnosed cartilage tear and was going to do, did arthroscopic surgery to find out that it was, that that is what I had, that was my condition.[8]
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> . . .
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> Q. (Ostrowski) You've indicated that you've had an opportunity to review your medical records.
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> A. (Claimant) That's correct.
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> Q. (Ostrowski) And did you -- did that include review of the operative report from today Dr. Mumford?
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> A. (Claimant) Yes.
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> Q. (Ostrowski) At my request did you look at this book entitled "Guides To The Evaluation of Medical Impairment," Fourth Edition?
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> A. (Claimant) Yes.
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> Q. (Ostrowski) Were you able to find your condition in that book?

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[7] Regular Hearing, February 12, 2001, pp. 10-11.

[8] Regular Hearing at 18-19.

A. (Claimant) Yes.

Q. (Ostrowski) I show you what's been marked as Claimant's Exhibit 1 consisting of three pages and ask if you can identify that.[9]

At that point, respondent's attorney objected to the inclusion of a portion of the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fourth Edition (Guides) in the record. The general nature of the objection goes to claimant not possessing the expertise to lay a proper foundation to express an opinion on his permanent functional impairment based on the Guides.[10]

Q. (Ostrowski) Mr. Bingham, were you able to locate the condition as you understand it from the operative report and from your discussion with Dr. Mumford?

A. (Claimant) Yes.

Q. (Ostrowski) And, specifically, where did you find your condition as you understand it?

A. (Claimant) It's on the last page under, impairment estimates for certain lower extremity impairments.

Q. (Ostrowski) And what, what condition did you understand from the operative report that you have?

A. (Claimant) The medial meniscoptomy [sic] which is the center meniscus that they removed from my knee.

Q. (Ostrowski) Okay. Was it your understanding that a portion of that was removed or the entire meniscus?

A. (Claimant) A portion of the meniscus.[11]

The ALJ's award did not address the issue of the nature and extent of claimant's disability because the ALJ denied claimant's claim for his failure to give respondent timely

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[9] Regular Hearing at 28-29.

[10] Regular Hearing at 29-33.

[11] Regular Hearing at 33-34.

notice of the accident. The majority, however, reversed that finding and found claimant had proved he gave respondent timely notice of his accident as required by K.S.A. 44-520 (Furse 1993). I agree with that conclusion. But the majority went on and found claimant had also met his burden of proving he suffered a permanent impairment of function to his lower extremity based on claimant's testimony alone. The majority found claimant proved he had a 2 percent permanent functional impairment of the left lower extremity in accordance with the Guides. Accordingly, the majority awarded claimant a 2 percent permanent partial disability of the left leg under the "scheduled injury" statute.[12]

The "scheduled injury" statute requires the loss of a scheduled member to be based upon permanent impairment of function to the scheduled member as determined using the Guides, if the impairment is contained therein.[13]

The majority's opinion points out that work-related injuries not covered by the schedule makes an additional requirement that competent medical evidence is needed to establish functional impairment under the Guides,[14] where the scheduled injury statute omits the requirement of competent medical evidence in proving an injured worker's functional impairment. The majority went on to hold as follows:

> Accordingly, the Board disagrees with respondent's argument that only a doctor can establish functional impairment for an injury contained in the scheduled injury statute.
>
> Once claimant established the nature of the surgical procedure and that the surgical procedure was rated in a table of the AMA *Guides* that had been introduced into evidence, a prima facie case was made for that percentage of impairment the *Guides* provide for that procedure. The burden then shifted to respondent to go forward with the evidence regarding the functional impairment rating, which it did not do. While expert medical testimony is generally required to support a medical opinion or something that requires special education, training and/or experience, such as making a diagnosis, that is not the situation here. When the AMA *Guides* rate a scheduled injury based merely on the surgical procedure performed and require no expert analysis and when the table that rates such surgical procedure has been introduced into the record, there is no valid reason to require expert medical testimony to establish the functional impairment rating.

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[12] *See* K.S.A. 1999 Supp. 44-510d(a)(16).

[13] *See* K.S.A. 1999 Supp. 44-510d(a)(23).

[14] *See* K.S.A. 1999 Supp. 44-510e(a).

I disagree with the majority and would find claimant failed to meet his burden of proving he has a 2 percent permanent functional impairment to his left lower extremity. One of the numerous changes the legislature made in the 1993 amendments to the Kansas Workers Compensation Act was to require that the Guides be used to determine permanent impairment of function for injured workers suffering from either a scheduled injury or a whole body injury if the injury does not result in a work disability. The majority is correct that the "whole body injury" statute also includes the requirement "as established by competent medical evidence" and the "scheduled injury" statute does not. But the "scheduled injury" statute also did not contain the requirement "as established by competent medical evidence"[15] before the 1993 amendments and the "whole body injury" statute always contained such requirement.[16]

In Kansas, the appellate courts have held that medical evidence is not essential or necessary to establish the existence, nature, and the extent of a worker's injury.[17] In Graff, the court reversed the Board's finding that claimant had failed to show that she had a work disability. Claimant in Graff had developed bilateral carpal tunnel syndrome caused by her activities as a flight attendant. She testified she could no longer perform the flight attendant work now or at the time she retired. The court held claimant's testimony was sufficient to support an award.

Here, the claimant cites Graff and argues, since medical testimony is not essential to establish claimant's disability in Kansas, then claimant's testimony that he reviewed Dr. Mumford's operative report and based on his interpretation of that report his permanent functional impairment is contained in Table 64 on page 85 of the Guides satisfies his burden of proving he sustained permanent functional impairment to his left lower extremity. The majority agreed with claimant's argument and granted claimant an award of a 2 percent permanent partial disability to the left leg.

The problem I have with the majority's analysis is that Graff and the cases cited in Graff do not address the determination of permanent functional impairment for an injury contained in the "scheduled injury" statute or permanent functional impairment for an injury contained in the "whole body injury" statute after both statutes were amended in 1993.

The Guides specifically state, "that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of

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[15] *See* K.S.A. 1992 Supp. 44-510d.

[16] *See* K.S.A. 1992 Supp. 44-510e(a).

[17] *See* Graff v. Trans World Airlines, 267 Kan. 854, 864, 983 P.2d 258 (1999) and cases cited therein.

disabilities."[18] Kansas and 55 percent of the 53 workers compensation jurisdictions, however, mandate or recommend by law or regulation the use of the Guides.[19] In those workers compensation jurisdictions, as in Kansas, Guides-based impairment ratings have become part of the benefit calculation. This lies within the province of the legislators which develop benefit schemes and not the editors of the Guides.[20]

The purpose of the Guides is to provide "a standard framework and method of analysis through which physicians can evaluate, report on, and communicate information about the impairments of any human organ system." The Guides define impairment "as an alteration of an individual's health status." According to the Guides, impairment "is assessed by medical means and is a medical issue."[21] Under the Guides the physician has the responsibility to evaluate a patient's health status and determine the presence or absence of an impairment."[22] The text of the Guides is complicated and technical and is established as an aid to the physician to estimate the extent of impairment.[23] The Guides is a reliable tool for measuring impairment if its rules are followed to produce acceptable conclusions about impairment.[24]

I would find the Guides is a tool that only physicians are capable of using to determine a permanent impairment estimate. Only physicians possess the educational background and experience to assess permanent impairment according to the Guides because the permanent impairment has to be assessed by medical means and is a medical issue.

Thus, a lay person, whether it be the claimant, an attorney or the trier of fact, is not qualified to determine an injured worker's condition and then to further determine an estimate of his permanent functional impairment based on that condition according to the Guides. The "scheduled injury" statute does not have to include the requirement that functional impairment not only be based on the Guides but also based on competent medical evidence because the Guides itself makes that requirement.

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[18] *See* American Medical Association, Guides to the Evaluation of Permanent Impairment, Fourth Edition, p. 5 (Guides).

[19] See Guides at 4.

[20] *See* Charles Richard O'Keefe, Jr., The Guides to the Evaluation of Permanent Impairment and Workers' Compensation in Indiana, 27 Indiana Law Review 647, 669 (1994).

[21] *See* Guides at 1.

[22] *See* Guides at 2.

[23] *See* 27 Indiana Law Review at 671.

[24] *See* 27 Indiana Law Review at 676.

The majority found claimant's testimony alone established his condition and based on that testimony the majority then determined, from the pages admitted into evidence of the Guides, the claimant's permanent functional impairment. I would find that claimant's testimony failed to establish his condition and would further find that the Board does not have the medical expertise to make independent findings of impairment under the Guides.

As set out above, claimant first testified that Dr. Mumford removed part of his cartilage in his left knee and some meniscus. Claimant was again asked about his understanding of his condition from Dr. Mumford's operative report. Claimant answered, "the medial meniscoptomy [sic] which is the center meniscus removed from my knee." Finally, claimant testified a portion of the meniscus was removed.

Admitted into evidence at the June 27, 2000, preliminary hearing, was a pamphlet claimant obtained from Dr. Mumford's office entitled Knee Arthroscopy. That pamphlet shows the anatomy of a knee. Articular cartilage covers the ends of both the femur and the tibia leg bones. The meniscus is a crescent of cartilage that provides cushioning between the leg bones. The knee has a lateral and a medial meniscus. Common knee problems are listed as meniscus cartilage tears and articular cartilage wear from age or injury. A meniscus tear is treated by removing or repairing the meniscus. The cartilage is repaired by shaving or removal of loose bodies of cartilage.

Here, the majority has interpreted claimant's understanding of Dr. Mumford's operative report that he removed a portion of claimant's medial meniscus. Claimant, however, testified, at different times, that both his cartilage and meniscus were treated during the operation. If Dr. Mumford only treated claimant's articular cartilage, during the operative procedure, and not the meniscus, then impairment would probably have been assessed according to Table 62 on page 83 of the Guides or from range of motion measurements instead of Table 64 on page 85 of the Guides. Moreover, claimant testified that his understanding of his condition according to Dr. Mumford's operative report was that the center meniscus was removed from his knee. Of course, the knee does not have a center meniscus. The meniscus located in the knee is identified as either medial or lateral.

In his brief to the Board, the claimant also argues that his testimony established uncontradicted evidence that his work-related accident resulted in a 10 percent permanent impairment to his left lower extremity. But for claimant to have a 10 percent permanent impairment of the lower extremity, Dr. Mumford would have had to remove a portion of both the medial and lateral meniscus.[25] Claimant also indicated, at one point during his testimony, that Dr. Mumford removed only a part of the medial meniscus. Additionally, claimant argues and the majority agreed that claimant's testimony in regard to his condition and his permanent functional impairment was reasonable uncontradicted evidence and

[25] *See* Guides at 85, Table 64.

could not be disregarded and should be regarded as conclusive.[26] Thus, claimant argues respondent had the duty to come forward with evidence to rebut claimant's uncontradicted testimony and did not do so.

I would find that respondent did not have to come forward and rebut claimant's testimony in regard to his condition and permanent impairment because his testimony was improbable, unreasonable, and further did not meet the credibility standard of worthy of belief.

I find the majority's conclusion that claimant's testimony alone is credible to prove his condition and permanent impairment according to the Guides is quite ironic because a qualified physician's medical evaluation report which determines claimant's condition and assesses permanent impairment according to the Guides, is not admissible evidence in a workers compensation case, without the physician's testimony, unless the medical evaluation report is ordered by the Administrative Law Judge.[27]

I do find appropriate, since the Guides are mandated by the Kansas Workers Compensation Act to prove permanent functional impairment, that the trier of fact, in some cases, on its own motion may consult the Guides to convert extremity impairment ratings to a whole person rating and to further use the Combined Value Chart to combine two or more impairments. Other jurisdictions allow the trier of fact to perform those types of functions which do not require medical expert testimony because the functions are merely a ministerial type of function.[28] Moreover, in another case, the trier of fact was permitted to use the Guides, on its own motion, without expert testimony, purely in support of its supposition that the medical panels included pain in their impairment ratings.[29] In Pomerinke, the Supreme Court of Idaho held that there was nothing in the Commission's findings or order that would indicate it relied on the Guides in assessing claimant's condition or formulated its own impairment rating. The Commission adopted the independent medical panel's rating and only referred to the Guides to form an opinion that the medical panels took pain into account and considered real limitations imposed by pain upon claimant's activities.

In the limited research that this Board Member has conducted, I found no jurisdiction that mandated the use of the Guides in determining permanent functional impairment that

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[26] *See* Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1977).

[27] *See* K.S.A. 44-519 (Furse 1993), K.S.A. 1999 Supp. 44-510e(a) and Roberts v. J.C. Penney Co., 263 Kan. 270, Syl.¶5, 949 P.2d 613 (1997).

[28] *See* Beale v Highwire, Inc., Ky. App., 843 S.W. 2d 898, 900 (1992) and Asher v. Blue Diamond Coal Company, Ky. App., 878 S.W. 2d 27, 30 (1994).

[29] *See* Pomerinke v. Excel Trucking Transport, Inc., 124 Idaho 301, 307, 859 P.2d 337 (1993).

would allow, as did the majority in this case, for claimant's testimony alone to establish his permanent condition and then for the trier of fact to interpret a provision of the Guides in order to assess permanent impairment.

In closing, I would caution all workers compensation practitioners to be very careful in deciding to establish permanent functional impairment in accordance with the Guides without the benefit of qualified medical expert testimony.

BOARD MEMBER

The undersigned Board Member also joins in the above Dissent with regard to the improper utilization of the AMA Guides.

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director